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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 196

SOUTHERN MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 22–28) are reported in 13 N. L. R. B. 304. The decree of the court below (R. 70–71) was entered without opinion and is not yet reported. The order of the court below upon petition for suspension of the decree and for rehearing (R. 82) was also entered without opinion and is not reported.

JURISDICTION

The decree of the court below (R. 70–71) was entered on February 16, 1940. A petition for sus-

pension of the decree and for rehearing was denied on April 3, 1940 (R. 82). The petition for writ of certiorari was filed on July 2, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Febuary 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

Petitioner entered into a stipulation consenting that the Board issue against it an order in specified form, and that the appropriate court enter a consent decree enforcing the order. The court below entered such a decree. The questions presented are:

1. Whether entry of the decree was improper, either (a) because petitioner had not failed to comply with the Board's order or (b) because of the time which elapsed between the execution of the stipulation and the filing of the petition for enforcement;

2. Whether the court erred in failing to incorporate in the decree certain provisions of the stipulation which interpreted, but were not part of, the order.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. Supp. V, Sec. 151 *et seq.*) are set forth in the appendix to the petition at pp. 30–33.

STATEMENT

Following the filing of a charge and amended charge (R. 13–18) by the Amalgamated Clothing Workers of America, setting forth that petitioner had violated Section 8 (1), (3), and (4) of the Act, the Board, petitioner, and the charging union, on March 21, 1939, entered into a stipulation in settlement of the case (R. 3–6). The stipulation provided that "by agreement of the parties hereto, the National Labor Relations Board may enter its Order in the following form," setting out a form of order in full (R. 4–5). The stipulation further provided (R. 7):

> 7. The respondent, Southern Manufacturing Company, hereby consents to the entry by the United States Circuit Court of Appeals for the appropriate circuit, upon application by the Board, of a consent decree enforcing an order of the Board in the form hereinabove set forth and hereby waives further notice of the application for such decree.

On April 27, 1939, the Board issued its complaint against petitioner (R. 9–12). On May 3, 1939, the Board held a hearing, upon notice (R. 12–13), before a Trial Examiner in Washington, D. C., for the purpose of introducing in evidence the charge

and amended charge, complaint, and stipulation (R. 1–2, 37–38).[1]

On June 15, 1939, the Board issued an order (R. 22–28) identical with the form of order set out in the stipulation (R. 4–5), and on July 27, 1939, the Board filed in the court below its petition for enforcement of the order (R. 29–32). In its answer, petitioner asserted that it had complied with the terms of the stipulation, and that when it signed the stipulation it understood that application for a decree of enforcement would not be made unless it failed to comply with the stipulation (R. 33–37).[2] After first declining to enter a decree, the court below, upon motion to reconsider the petition for enforcement (R. 66), entered a decree on Febru-

[1] Prior to the issuance of the complaint and the notice of hearing the Board had notified petitioner that (R. 38):

"Under the National Labor Relations Act, the Board cannot enter an order unless a complaint has been issued and therefore the Company cannot waive the issuance of the complaint as provided for in paragraph number 2 of the stipulation. In order to carry out the understanding of the parties to the stipulation, the Board purposes to issue a complaint and notice of hearing * * *. This hearing will be for the single purpose of introducing into the record stipulations signed by the parties. After the stipulation has been introduced, no further evidence will be received, the hearing will be closed, and the order issued by the Board after such hearing will be that provided for in the stipulation."

[2] This assertion as to petitioner's understanding of the stipulation was supported by an affidavit filed by petitioner in the court below (R. 77–80), but in affidavits filed by the Board it was denied that any basis existed for the asserted understanding. See note 3, p. 5, *infra*.

ary 16, 1940, enforcing the order consented to by the parties (R. 70–71). A petition for suspension of the decree and for a rehearing (R. 72–74) was denied on April 3, 1940 (R. 82).

ARGUMENT

1. Petitioner asserts (Pet. 6) that the court below erred in entering the decree to which petitioner had consented in the stipulation, because petitioner had ceased to violate the Act before the Board's complaint was issued and because petitioner was not threatening to violate the Board's order when the Board's petition for enforcement was filed. In brief, petitioner contends that the decree to which it stipulated should not have been entered because it had not violated the Act since signing the stipulation.[3] Petitioner's contention is, of course, wholly

[3] In the stipulation petitioner unequivocally consented to the entry of a consent decree by the appropriate circuit court of appeals (*supra*, p. 3). In its answer (R. 36) to the Board's petition for enforcement and by affidavit in the court below (R. 78, 79) petitioner asserted, however, that when it signed the stipulation it understood that application for a decree of enforcement would not be made unless it failed to comply with the stipulation (R. 36). Petitioner repeats that assertion here (Pet. 2, 17–18), although not squarely positing an argument upon it.

In the first place, while petitioner has never clearly claimed that its asserted understanding was other than unilateral (see R. 36, 78, 79), the affidavits of the Board representatives not only denied that there was any understanding outside of the stipulation but affirmatively asserted that they had advised petitioner during the negotiations that the Board would apply for entry of a consent decree as soon as

unsupported by authority; if accepted it would seriously embarrass, if it would not wholly preclude, use of consent decrees both under this Act and under other legislation which is enforced by judicial decree.[4]

Petitioner's general contention (Pet. 6–7, 25–28), that an enforcement decree should not be entered without a showing of non-compliance with the Board's order is plainly lacking in merit. In support of it petitioner cites only decisions under the Federal Trade Commission Act. That Act provides (§ 5, 15 U. S. C. § 45) that "If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same

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it approved the settlement stipulation (R. 66–70). The court below presumably resolved this issue of fact in favor of the Board, in so far as it found it necessary to pass upon it. Compare *Chandler* v. *Pomeroy*, 143 U. S. 318, 337.

In the second place, in the stipulation petitioner consented unequivocally to entry of the decree (**R. 6**, *supra*, p. 3), and its consent could not be conditioned by any belief or oral understanding not embodied in the written stipulation. *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th). Compare *Boffinger* v. *Tuyes*, 120 U. S. 198, 205; *Van Winkle* v. *Crowell*, 146 U. S. 42.

[4] The argument here urged by petitioner was rejected in *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th). And compare *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497 (C. C. A. 5th). In *Swift & Co.* v. *United States*, 276 U. S. 311, 325–326, this Court dismissed summarily a contention that a consent decree entered under the anti-trust acts was invalid because there was no case or controversy, an argument suggested but not squarely advanced here.

is in effect, the commission may apply to the [appropriate] circuit court of appeals * * * for the enforcement of its order". Under this provision there is some authority, relied upon by petitioner, that the Federal Trade Commission must show that its order is being disobeyed before it can secure an enforcement decree. But Section 10 (e) of the National Labor Relations Act was phrased expressly to avoid such a result. Originally it was patterned after the above quoted provision of the Federal Trade Commission Act, but in conference the present provisions were substituted to make it clear that the Board might secure an enforcement decree without showing violation of its order.[5]

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[5] The report of the Conference Committee reads (H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5):

"Section 10 (e) of the Senate bill provided that 'if such person fails or neglects to obey such order of the Board while the same is in effect, the Board may' petition any circuit court of appeals, etc. House amendment numbered 15 strikes out the quoted phrase and substitutes 'The Board shall have power to' petition any circuit court of appeals, etc. The conference agreement accepts this amendment. The purpose is to provide for more expeditious procedure. Delay in enforcement procedure due to technicalities would be especially harmful under this act. It is the purpose of this amendment to authorize the Board to apply to the courts for an enforcement order, without encountering the delay resulting from certain court decisions (a small minority) under the Federal Trade Commission Act, requiring the Commission to show in every case that its order is being disobeyed before the court will even proceed to consider the matter on its merits, or render a decree enforcing the Board's order. As the majority of courts have declared under the Federal Trade Commission Act, neither the administrative body nor the courts are required to assume in the ordinary

Even if petitioner has complied with the affirmative directions of the Board's order, the concomitant cease and desist provisions are in the nature of a continuing injunction having prospective operation. That petitioner had in part rectified or had for the time being discontinued its unlawful practices was not, therefore, material to the single question before the court below upon the Board's petition for enforcement: whether the Board's order was lawful when made. This Court and the various circuit courts of appeals have uniformly enforced Board orders despite contentions that the unfair labor practices in question had been discontinued before the filing of charges, or at some other date prior to the Board's application for an enforcement decree, or that the company had fully complied with the Board's order.[6] Cf. *Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260.

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case that the unlawful practice in question, even though presently terminated, will not be resumed in the future. If such practice is resumed, there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings."

[6] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 873–874 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585; *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, 101 F. (2d) 841, 848 (C. C. A. 4th), reversed on other grounds, 308 U. S. 241; *National Labor Relations Board* v. *Pure Oil Co.*, 103 F. (2d) 497, 498 (C. C. A. 5th); *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678, 681

2. There was no unreasonable delay by the Board in applying for enforcement of the order issued by it pursuant to the stipulation. The stipulation was executed on March 21, 1939 (R. 6) and was approved by the Board on May 26, 1939 (R. 21). The order of the Board was entered on June 15, 1939 (R. 22) and the petition for enforcement was filed on July 27, 1939 (R. 29). Neither the Act nor the stipulation prescribes any time within which the Board must petition for enforcement, and the lapse of time here could not in any event be regarded as unreasonable, particularly in the absence of any showing of prejudice. *National Labor Relations Board* v. *La Salle Hat Co.*, 105 F. (2d) 709 (C. C. A. 3d), relied upon by petitioner, is inapposite, whether or not it was correctly decided. There the stipulation for a consent decree provided that the decree should be entered "forthwith", and a period of more than 7 months elapsed between the issuance of the order and the application for enforcement.

3. The order of the Board (R. 27–28) and the decree entered by the court below (R. 70–71) were

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(C. C. A. 6th), certiorari denied, 308 U. S. 568; *National Labor Relations Board* v. *Gerling Furniture Mfg. Co.*, 103 F. (2d) 663 (C. C. A. 7th); *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 96 F. (2d) 197 (C. C. A. 9th); *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193, 194 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488, 493 (C. C. A. 9th), certiorari denied, 306 U. S. 643.

in the exact form consented to by petitioner (R. 4–5, 6). Petitioner may not, therefore, complain that the court below failed to incorporate in the decree various provisions of the stipulation interpreting, but not part of, the order. The matter is of no moment in any event: the interpretation of the order will be material only if there is hereafter a dispute as to compliance, and in that event the decree will be construed in the light of the entire record of which the explanatory provisions of the stipulation are a part.

CONCLUSION

The petition presents no question of general importance or conflict of decisions and should therefore be denied.

Respectfully submitted.

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